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ALEXANDER L. STEVAS,
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No. 85, Original

In the Supreme Court of the United States

OCTOBER TERM, 1979

STATE OF TEXAS, *Plaintiff,*

v.

STATE OF OKLAHOMA, *Defendant.*

REPORT OF SPECIAL MASTER ON MOTION FOR ENTRY OF JUDGMENT BY CONSENT

John A. Carver, Jr.
Special Master

600 Equitable Building
730 Seventeenth Street
Denver, Colorado 80202

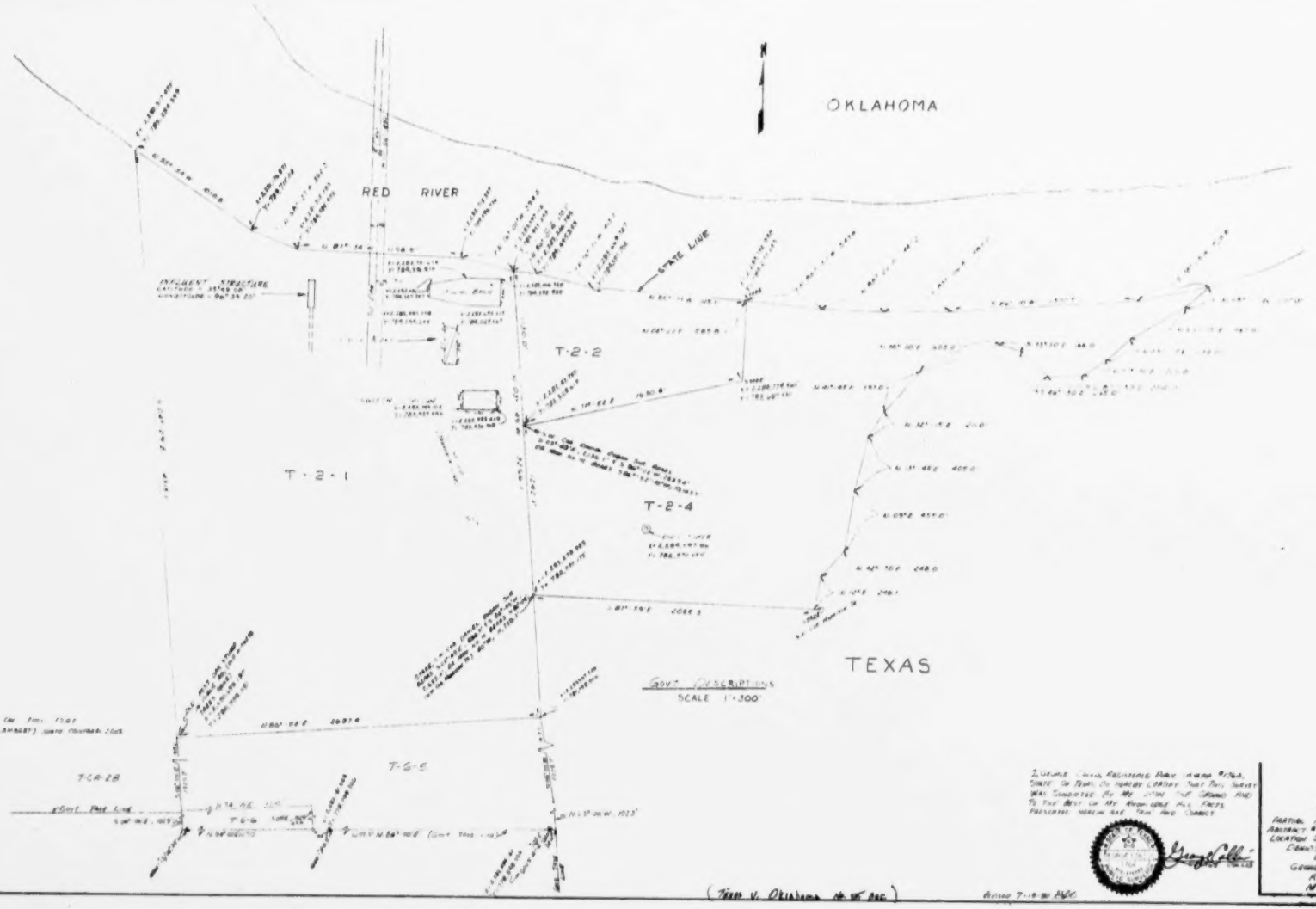

EXHIBIT-(4)

PARTIAL MAP OF LANDS, DEDICATED TO THE PUBLIC USE, IN ABSTRACT # 828, GRAYSON COUNTY, TEXAS, SHOWING LOCATION OF PUBLIC FOUNTAIN FACILITIES IN DENISON LAKE PROJECT, RED RIVER, TX.

DATED APRIL 15, 1970

GEORGE COLLA, LAND SURVEYOR

FIELD BOOK

MCKINNEY, TEXAS

In the
Supreme Court of the United States
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No. 85, Original

STATE OF TEXAS, *Plaintiff,*

v.

STATE OF OKLAHOMA, *Defendant.*

REPORT OF SPECIAL MASTER ON MOTION FOR ENTRY OF JUDGMENT BY CONSENT

The State of Texas brought this action to establish the location of a portion of its boundary with the State of Oklahoma along the Red River. The States have agreed upon a determination of the boundary within the area of uncertainty and have filed a joint Motion for Entry of Judgment by Consent, herein referred to as the "Motion", in accordance with their determination. The Motion has been referred to the Special Master. _____ U.S. _____, (Order of June 22, 1981). The Solicitor General was advised of the Motion by the Special Master and was requested to set forth the position of the United States on the proposed consent judgment. By letter of July 28, 1981, the Deputy Solicitor General declined to intervene in this matter on behalf of the United States, but expressed agreement with the position of the States. The Special Master submits this Report recommending the granting of the Motion in all but one particular.

The Texas-Oklahoma boundary has been the subject of numerous lawsuits. The Red River originally formed the boundary between the United States and the Spanish possessions, pursuant to the Treaty of 1819, 8 Stat. 252 (1821). In *United States v. Texas,* 162 U.S. 1 (1896), the Supreme Court construed the boundary definition of the Treaty of 1819 as establishing the boundary between the Oklahoma Territory

and the State of Texas at the south cut bank of the Red River. In *Oklahoma v. Texas*, 256 U.S. 70 (1921), the Court held that the admission of Oklahoma to statehood in 1906 did not affect this boundary. The Supreme Court provided a definition of what constitutes the south cut bank of the Red River in its partial decree in *Oklahoma v. Texas*, 261 U.S. 340, 341-43 (1923), holding in pertinent part:

1. The boundary between the States of Oklahoma and Texas, where it follows the course of the Red River from the 100th meridian of west longitude to the eastern boundary of the State of Oklahoma, is part of the international boundary established by the treaty of 1819 between the United States and Spain, and is on and along the south bank of that river as the same existed in 1821, when the treaty became effective, save as hereinafter stated.

2. Where intervening changes in that bank have occurred through the natural and gradual processes known as erosion and accretion the boundary has followed the change; but where the stream has left its former channel and made for itself a new one through adjacent upland by the process known as avulsion the boundary has not followed the change, but has remained on and along what was the south bank before the change occurred.

3. Where, since 1821, the river has cut a secondary or additional channel through adjacent upland on the south side in such a way that land theretofore on that side has become an island, the boundary is along that part of the south bank as theretofore existing which by the change became the northerly bank of the island; and where by accretion or erosion there have been subsequent changes in that bank the boundary has changed with them.

4. The rules stated in the last two paragraphs will be equally applicable to such changes as may occur in the future.

5. The south bank of the river is the water-washed and relatively permanent elevation or acclivity, commonly called a cut bank, along the southerly side of the river which separates its bed from the adjacent upland, whether valley or hill, and usually serves to confine the waters within the bed and to preserve the course of the river.

6. The boundary between the two States is on and along that bank at the mean level attained by the waters of the river when they reach and wash the bank without overflowing it.

7. At exceptional places where there is no well defined cut bank, but only a gradual incline from the sand bed of the river to the upland, the boundary is a line over such incline conforming to the mean level of the waters when at other places in that vicinity they reach and wash the cut bank without overflowing it.

....

12. The two States and the United States having joined in a request that they be permitted to withdraw the prayer in their pleadings that the boundary for its full length along the river be run, located and marked upon the ground, and having also joined in a further request that the boundary be run, located and marked only at the places hereinafter named, the requests are granted. ...

....

(c) Along all places where by avulsion since 1821 the river has come to occupy a new channel. ...

Following this decree, the area of the river now in question, which forms the northern boundary of Grayson County, Texas between the 97th and 96th meridians of west longitude, was not surveyed. The commissioners who were appointed pursuant to the Court's partial decree filed a documentary report, styled as the Third Report of the Boundary Commissioners, *Oklahoma v. Texas*, 269 U.S. 536 (1925). At page 41 of the Report the following entry appears:

VII

IN
GRAYSON COUNTY, TEXAS,
OPPOSIVE
MARSHALL AND BRYAN COUNTIES,
OKLAHOMA.

Public Hearing:
Sherman, Texas, May 7, 1925

We found no avulsive changes in the position of the Red River in this County and make no surveys.

From this Report it is apparent that the area in question was not requested by the States to be surveyed, nor had there been any avulsive change in this reach which would have required a survey under the Court's decree.

The only evidence submitted which refers to surveys of the location of the south bank of the Red River is contained in Appendix C-2 to the Motion for Entry of Judgment by Consent. Appendix C-2 is the report of a surveying firm retained to survey the line proposed by the States as their boundary. The surveyors' report refers to surveys of 1839 and 1840 and indicates that the boundary shown by these early surveys is 57.5 feet north of the boundary recommended by the States.

The present controversy was generated by the construction of Denison Dam. In 1938 Congress authorized the construction of the Dam on the Red River at a point approximately five miles north of the City of Denison in Grayson County, Texas. Flood Control Act of 1938, Pub. L. No. 761, 52 Stat. 1215 (1938). The construction of the Dam resulted in the formation of Lake Texoma west of the Dam site. The Lake is approximately 25 miles long and covers the former channel of the Red River. East of the Denison Dam the River was rechan-

neled for approximately one-half mile to accommodate hydroelectric facilities. The issue in this case is whether the impoundment of water in Lake Texoma and the rechanneling of the Red River below Denison Dam have altered the south bank of the River and thereby affected the boundary between Texas and Oklahoma.

The effect of the construction of Denison Dam on the Oklahoma-Texas boundary was first raised in proceedings before the Federal Energy Regulatory Commision ("FERC"), concerning jurisdiction of the FERC over the Texas Power & Light Company. *Texas Power & Light Co.*, FERC Docket No. E-9578. The FERC is authorized under the Federal Power Act to regulate the sale of electricity in interstate commerce. 16 U.S.C. § 824 (1976). Texas Power & Light Company purchases electricity generated at Denison Dam from the Southwestern Power Administration, a part of the United States Department of Energy, which it then sells to private customers and interconnected utilities, all of whom are located within the State of Texas. Texas Power & Light Company has historically been considered a purely intrastate utility not subject to FERC jurisdiction.

One issue raised in the FERC proceedings is whether the power generating house at Denison Dam is located in the State of Texas or the State of Oklahoma. The power house was constructed south of the Red River as the River existed prior to the construction of Denison Dam. The FERC, however, has been urged to take the position that the boundary was changed by the construction of the Dam and that the new boundary is the south shore of Lake Texoma and the south bank of the rechanneled portion of the River below the dam. If this contention is correct, the power house would be located north of the state line in Oklahoma, and Texas Power & Light Company may be considered to be engaged in the interstate transmission of electricity and to be subject to FERC jurisdiction.

Texas intervened in the FERC proceedings and moved for a stay pending termination of this litigation. The stay was granted. *Texas Power & Light Co.*, FERC Docket No. E-9578 (Order of April 4, 1980).

In their Motion, the States pray that this Court adjudge the boundary between the States to be the south bank of the Red River as it existed prior to the construction of Denison Dam. This location is said by the States to coincide with the boundaries of certain tracts of land acquired by the United States in judicial actions brought to obtain land for construction of the Dam and the Reservoir.

The acquisition judgments which form the basis of the States' Motion are set forth in Appendices B-1, B-2 and B-3 to the Motion. The legal descriptions in these acquisition judgments are based upon surveys which were performed by the United States Army Corps of Engineers in 1939. The States retained a registered public surveyor of the State of Texas to prepare a reenactment survey of the surveys performed in 1939 by the Corps of Engineers. The reenactment survey and the accompanying report, Appendices C-1 and C-2 to the Motion, form the basis of the States' determination of their boundary.

Both States agree that the prior determinations of this Court with regard to the Texas-Oklahoma boundary are *res judicata*. Consequently, the proposed consent judgment must conform to the provisions of those decrees. The central issue of this case relates to paragraph 9 of the proposed consent judgment which asserts:

> The construction of the Texoma Reservoir and Denison Dam did not alter the boundary between Texas and Oklahoma as the South bank of the Red River as it existed prior to such construction in any manner whatsoever.

The conformance of this assertion to previous decisions of this Court, and in particular to the Court's partial decree of 1923, presents a question of law.

Paragraphs 2 and 3 of the Court's partial decree, quoted above, offer guidance as to what manner of changes in the River would alter the boundary between the States. Paragraph 2 provides that the location of the boundary will follow changes in the south bank caused by natural and gradual accretion or erosion, but will not follow changes in the south bank caused by avulsion. Nor, under paragraph 3, will the boundary follow changes resulting from the River cutting an "additional channel through adjacent upland on the south."

Reading the Court's partial decree as a whole, it would appear that the interpretation given the Treaty was that only natural, gradual changes in the south bank through erosion and accretion would affect the state boundary, while changes in the south bank from other causes would not affect the boundary. The alteration of the south bank of the River in connection with the construction of Denison Dam, not being the result of gradual and natural erosion or accretion, would not effect a corresponding change in the state line. Consistent with this, the States propose that the boundary be established as the last natural location of the south bank of the Red River prior to the construction of the Denison Dam. The Deputy Solicitor General agrees with this proposition.

The Special Master concludes that the construction of Denison Dam, the impoundment of water in Lake Texoma, and the rechanneling of the Red River below the Dam did not effect a change in the boundary between the States.

There remains the issue of what was the last natural location of the south bank of the Red River prior to construction of the Dam. The States propose that the line be established with reference to the northern boundaries of the three tracts

of land surveyed by the Corps of Engineers in 1939 and acquired by the United States under acquisition judgments, as previously discussed. The States propose a boundary line which is described by metes and bounds in paragraph 7 of the proposed consent judgment and which is represented to be drawn from the acquisition judgments, Appendices B-1, B-2 and B-3 to the Motion. The Special Master notes that the surveyor's report, Appendix C-2 to the Motion at 24, contains the following statement:

> We also verified our survey and the descriptions of the three tracts contained in the 1940 United States acquisition judgments (which were based on the 1939 Corps of Engineers Survey) with the original field notes of the Daniel Dugan, Jr. Survey, dated January 9, 1840, the original patent of said survey from the Republic of Texas to Daniel Dugan, Jr. dated December 1, 1845, and the original field notes of the J. B. Sharpless Survey, dated December 30, 1839, and find that the South Bank of the Red River as called for in said original field notes and patent was located approximately 57.5 feet North of the South Bank as shown in our survey and in the description of the three tracts in the United States acquisition judgments.

It is the position of the States that the shift southward of the River from 1845 to 1939 was the result of gradual erosion of the south bank. Consequently, under paragraph 2 of the Court's 1923 partial decree, quoted above, the boundary would change with the River. The Deputy Solicitor General concurs in this conclusion. There being no evidence to the contrary, the Special Master agrees with the assertion of the States that the last natural location of the south bank of the Red River prior to the construction of Denison Dam was that surveyed by the Corps of Engineers in 1939, as described in paragraph 7 of the proposed consent judgment.

Paragraph 10 of the proposed consent judgment contains language permanently enjoining each State from disputing the boundary line set forth in the proposed consent judgment. Since the proposed consent judgment, if entered by the Court, would be *res judicata*, the Special Master fails to see any necessity for a permanent injunction. Although requested to do so, neither State provided legal justification for the entry of such an injunction. By letter of August 10, 1981, both States represented that the issuance of a perpetual injunction is not essential to a resolution of this case. The Special Master recommends against it.

The Special Master recommends that the Motion for Entry of Judgment by Consent be granted and that the proposed judgment be entered, with the deletion of paragraph 10 thereof.

Dated at Denver, Colorado November 30, 1981.

John A. Carver, Jr.
Special Master

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